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Conflict of Laws, Comparative Law and Civil Law: A Tribute to Symeon C. Symeonides
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Revolution and Evolution in Conflicts Law

Kurt Siehr

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I. REVOLUTION

When Symeon Symeonides lectured in my conflicts class in Zurich he started with the landmark case *Babcock v. Jackson*.[1] He told the story of the weekend trip of the Rochester families to Ontario and how these persons became known to all students of conflicts law. The lower courts had applied the traditional rule of *lex loci delicti commissi* and referred to the law of the Canadian Province of Ontario. This would not have created any problem if Ontario had not enacted a "guest statute" providing that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle."[2] According to this "guest statute," a guest has no claim in tort against the owner or driver because the statute aims to prevent fraudulent activities between the driver and the guests. Instead of limiting this rule to insurance contracts governed by Ontario law or to residents of the Province, or instead of discarding this Ontario rule because it violates public policy of the State of New York, Judge Fuld applied the "center of gravity" or "grouping of contacts" theory of the conflict of laws and evaluated the interests of Ontario and New York in having their law applied to the present case. The result of such an evaluation is evident. There is almost no interest of the Province of Ontario but a predominant interest of New York in compensating the victim, Miss Babcock. Very interesting is Judge Fuld's final conclusion. He discarded the traditional rule of *lex loci delicti commissi* and introduced the rule that the law of the jurisdiction which has the strongest interest in the resolution of the particular issue governs. This conclusion is interesting insofar as it is not the only one to be drawn. On the other hand, this does not imply that the dissenting Judge Van Voorhis is correct. He criticized the "substantial changes in the law of torts" and anticipated a "confusion which such a change will introduce."[3] Judge Van Voorhis should have concurred and given another reasoning for the correct solution that New York law governs.

It was Judge Fuld's reasoning which stirred up the American conflicts revolution. It originated in the law of torts and spread to other areas as well. Symeon ably described this conflicts revolution to my class, and my students asked whether there has been similar upheaval in Europe or in Switzerland. The answer is in the negative, although many European jurisdictions agree with Judge Fuld's

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* Professor of Law at the University of Zurich Faculty of Law.

1. 191 N.E.2d 279 (N.Y. 1963).
2. Highway Traffic Act of Province of Ontario, R.S.O., ch. 172, §105(2) (1960) (Can.).
3. *Babcock*, 191 N.E.2d at 286-87.

result. The explanation of such a difference is an interesting aspect of comparative conflicts law.

II. EVOLUTION

A. National Developments

Until the 1970s, there were very few written rules on private international law (Conflict of laws). Apart from the codifications of civil law in Italy (1942), Greece (1940/46), Portugal (1966) and Spain (1889/1974), there were some special statutes on private international law in East Germany (1975), Czechoslovakia (1963) and Poland (1965). They laid down the rule of *lex loci delicti commissi* and interestingly provided for an exception for domestic citizens or residents of a tort relationship created abroad. This was done in Poland[4] and in Portugal.[5] The courts of other jurisdictions were in the same position as the Court of Appeals of New York in *Babcock v. Jackson*. They had to decide whether to change their precedents, make exceptions, adjust to current theories or create a new one. This they did in several countries.

1. Switzerland

When Symeon stated the facts of *Babcock v. Jackson*, my students were reminded of a very similar set of facts and almost the same problems put to the Swiss Federal Tribunal.[6] Two friends, Rudolf Vögtli and Werner Müller, residents of Basle (Switzerland), bought a second-hand car for their common trips in Switzerland and to neighboring countries. In 1963, the same year that *Babcock v. Jackson* was decided, Vögtli and Müller set out in their car for vacations in France. One day Müller lost control of the car, hitting a tree and a wall. The car was completely damaged and Vögtli severely injured. Back in Switzerland, Vögtli initiated a lawsuit against Müller and asked for compensation. There was no French "guest statute" which had to be avoided. Even the French statutes of limitations were more in favor of the plaintiff, who started the lawsuit rather late in 1970 when the Swiss statute of limitations for tort claims had already expired. The Federal Court qualified the relation between Vögtli and Müller as a kind of simple company and approved the plaintiff's contention that Müller violated his contractual obligations under Swiss law.

The only differences between *Babcock v. Jackson* and *Vögtli v. Müller* were that Vögtli and Müller commonly owned the car, neither one of them was a guest or host, and the relation between them was much stronger than that between Miss Babcock and the Jacksons.

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4. Polish Act of 1965, art. 31, § 2.

5. Código Civil [C.C.] art. 45(3) (Port.).

6. Federal Court, May 2, 1973, 99 II *Entscheidungen des schweizerischen Bundesgerichts* 315 (Vögtli gegen Müller) (Switz.).

Today, the Hague Convention of 1971[7] would apply and the domestic Swiss Federal Act of Private International Law of 1987[8] provides in Article 133(1) an exception to the general rule of *lex loci delicti commissi,* mentioned in Article 133(2). Article 133(1) reads: "When a tortfeasor and the injured party have their habitual residence [at the time the tort was committed] in the same state, claims in tort are governed by the law of such state." If the case *Babcock v. Jackson* had to be decided under this rule, the tort laws of New York would govern Miss Babcock's claim for compensation.

2. Germany

In West Germany, the only proper conflicts provision for torts was §1(1) of the Ordinance of December 7, 1942, on the Application of Law in Cases of Torts Committed by German Citizens outside of German Territory.[9] According to this ordinance, all torts committed abroad by a German tortfeasor against another German citizen were governed by German law. This rule was necessary because the ordinary rule applied by German courts was the rule of *lex loci delicti commissi* up to the limits of German tort law.[10]

There are, however, Babcocks, Jacksons, Vögtlis and Müllers in Germany. What about foreigners living in Germany who meet abroad and a tortious act is committed abroad? This happened when residents of Germany travelled abroad and a road accident occurred between residents of Germany. German courts developed German case law in three steps:

- If Germans raise a tort claim because of a tort committed abroad, German law applies only if the Germans were habitually resident in Germany (restriction of §1(1) of the Ordinance);[11]
- German law applies if a tort has been committed between residents of Germany in a state of which neither of them is a citizen.[12]
- German law applies if a tort has been committed abroad between residents of Germany.[13]

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7. *See infra* Part II.B.2.

8. English version *available in* 37 Am. J. Comp. L. 193 (1989), and *in* Private International Law and Arbitration, Switzerland, Documents 1 (Andreas Bucher & Pierre-Yves Tschanz eds., 1996).

9. Verordnung 7.12.1942 (RGBl. I.p.706); *see also* Internationales Privat- und Verfahrensrecht. Textausgabe, 174 (Erik Jayme & Rainer Hausmann eds., 4th ed. 1988).

10. Introductory Act to the BGB [Civil Code], art. 38 (F.R.G.).

11. Bundesgerichtshof [BGH] [Supreme Court] Mar. 8, 1983, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 87, 95; *see also* Die deutsche Rechtsprechung auf einem Gebiet des Internationalen Privatrechts im Jahre 1983, No. 31 (German resident in Poland).

12. BGH, Jan. 8, 1985, BGHZ 93, 214; *see also* Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 1985, No. 37 (accident in Portugal by a German and a Spanish resident in Germany).

13. BGH, July 7, 1992, 119 *BGHZ* 119, 137; *see also* Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 1992, No. 58 (Turkish residents of Germany have an accident in Turkey).

This exception to the still valid rule of *lex loci delicti commissi* is now laid down in Article 40(2) Introductory Act to the BGB: "If the tortfeasor and the victim, at the time the tort was committed, had their habitual residence in the same state, the law of this state applies." According to this rule, and also according to the Ordinance of 1942 and the German case law, Miss Babcock would have been compensated according to the law of New York.

3. United Kingdom

Symeon was lucky not being obliged to explain the old English conflicts rule for tortious behavior laid down in the cases *Phillips v. Eyre*[14] and *Machado v. Fontes*.[15] Before the latter case was overruled and the former one abolished by legislation,[16] other young boys contributed to the development of private international law. Richard M.M. Chaplin and David M. Boys were serving in H.M. Armed Forces and temporarily stationed in Malta. David Boys was injured in a road accident in Malta, again in 1963, caused by the admitted negligence of Richard Chaplin. Back in England, Boys brought an action against Chaplin for special damages (£53) and general damages (£2,250). Boys recovered these damages and Chaplin appealed to the House of Lords and raised the issue of the law to be applied. Under the law of Malta, the place of injury, only special damages (£53) can be recovered, and therefore the appeal should be granted and the decision of the Court of Appeal be corrected. The House of Lords unanimously affirmed the decision of the Court of Appeal albeit on different grounds.[17] Although the American case *Babcock v. Jackson* was discussed, the Lords refrained from overruling *Phillips v. Eyre* and did not break new ground by proclaiming new approaches. They either restricted the Maltese limitation of recovery of damages to cases having a substantial connection to Malta (Lord Hodson) by admitting an exception to the general rule of *Phillips v. Eyre* (Lord Wilberforce) or by qualifying the amount of damages as a matter of the law of procedure, hence of the English *lex fori* (Lords Donovan and Pearson). Today, torts are governed by the rule of *lex loci delicti commissi* (sect. 11 of the P.I.L. Act 1995), and situations of the type in *Chaplin v. Boys* will be solved by the rule of displacement provided in sect. 12 of the P.I.L. Act 1995.[18]

4. Netherlands

The Dutch rules on conflict of laws are still to a large extent judge-made law, unless international conventions apply. A comprehensive statute on private international law has been drafted but has not yet been submitted to parliament.

14. (1870) L.R. 6 Q.B. 1.
15. [1897] 2 Q.B. 231 (C.A.).
16. Private International Law (Miscellaneous Provisions) Act, 1995, ch. 42, § 10 (Eng.).
17. [1971] App. Cas. 356 (appeal taken from Eng. C.A.).
18. *See supra* note 16, and the general note to §12(2) *in* [1995] 3 Current Law Statutes ch. 42, at 42-22.

One would expect that the Dutch Babcocks and Jacksons were riding their bicycles in Belgium, but they were also motorized and went home in their car from Germany. Before getting home, the driver, Th. Hubers, hit a pillar of a viaduct and L. Kaak was injured. He brought a lawsuit in the Netherlands against Hubers and asked for damages. According to German law, a tort claim may have been excluded because the employer, by social insurance, covers all costs for any accident of his employees while being employed. The Dutch Hoge Raad applied Dutch law because both of them were still residents of the Netherlands and therefore the case had closer connections to Dutch law.[19] The same exception to the rule of *lex loci delicti commissi* is and will be made by international instruments.

B. International Development

European private international law has been unified to a large extent. The Hague Conference on Private International Law and the European Union are the major organizations responsible for this process. There has been and there are still efforts being made to unify also the international law of torts.

1. Beneleux Project of 1969

Belgium, Luxemburg and the Netherlands planned to unify their private international law by an international convention. The first draft was submitted in 1950.[20] The final version of July 3, 1969[21] never entered into force because the Benelux States withdrew the project in favor of a European Convention on private international law.[22] Article 14(1) of the Benelux Project fixed the rule of *lex loci delicti commissi* but Article 14(2) added an escape clause: "If the consequences of a tort have close contacts to another state other than that of the place of tort, the obligations arising out of tort are governed by the law of this state." The comment to this provision mentions the common nationality or common residence of tortfeasor and victim as factors displacing the *lex loci delicti commissi.*[23]

2. Hague Convention on Traffic Accidents of 1971

The Hague Conference on Private International Law completed at its Eleventh Session (1968) the Hague Convention on the Law Applicable to Traffic Accidents which was finally signed on May 4, 1971.[24] This Convention is in force in thirteen European states, e.g. Austria, Belgium, France, Netherlands, Spain and Switzerland.

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19. Hoge Raad, Dec. 18, 1981, *Nederlandse Jurisprudentie* 1982 No. 263, and *Nederlands Juristenblad* 1982 at 113.

20. *Cf.* 40 Revue critique de droit international privé 710 (1951).

21. Tractatenblad van het Koninkrijk der Nederlanden 1970 No. 16.

22. *See infra* Part II.B.3.

23. *See supra* note 21.

24. Hague Conference on Private International Law, Collection of Conventions (1951-1996), No. XIX, at 142 (1997).

The Convention fixes in Article 3 the rule of the *lex loci delicti commissi.* For cases such as the Babcock case, Article 4 lit. a provides: "Subject to Article 5 [on damage to goods] the following exceptions are made to the provision of Article 3:

> a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability.
> - towards the driver or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
> - towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred. . . ."

Under this exception, the law of the State of New York as the *lex stabuli* of the motorcar of the Jacksons would have governed the case of *Babcock v. Jackson.*

3. European Draft Convention on Non-Contractual Relation of 1972/1999

The European Union planned to extend the Convention which finally became the Rome Convention of 1980 on the Law Applicable to Contractual Relations[25] also to non-contractual relations.[26] These plans did not materialize because of the English double actionability rule of *Phillips v. Eyre.*[27] The draft of 1972 started in Article 10(1) with the rule of the *lex loci delicti commissi* and added in subsection 2 and 3 an exception:

> Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occured.
>
> However, if, on the one hand, there is no significant link between the situation resulting from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connection with another country, then the law of that other country shall apply.
>
> Such a connection must normally be based on a connecting factor common to the victim and the author of the damage but, if the question in issue is the liability of a third party for the acts of the author, it must normally be based on one which is common to the victim and the third party.
>
> Where there are two or more victims, the applicable law shall be determined separately for each of them.

It was commonly accepted that Article 10(3) covers also the case *Babcock v. Jackson.*[28] After the reform of the English conflicts law

25. *Cf.* Contracts (Applicable Law) Act, 1990, Ch. 36, Schedules (Eng.).

26. *Cf.* Kurt H. Nadelmann, The EEC draft of a Convention on the Law Applicable to Contractual and Non-Contractual Obligations, 21 Am. J. Comp. L. 584, 587 (1973).

27. *See supra* note 9.

28. *Cf.* Kurt Siehr, *General Report on Non-Contractual Obligations* (Arts. 10-14), *General*

for torts,[29] the Rome Convention of 1980 may be amended. This has been done by the Council of Ministers. Again the *lex loci delicti commissi* is the general starting point (Article 3) and is modified by Article 13. Article 13(1) expressly mentions the common habitual residence of tortfeasor and victim as criteria for setting aside the *lex loci* rule. Insofar the present draft does not change the 1972 version.

4. Groupe européen de droit international privé

A group of European scholars have drafted a proposal for a new Rome Convention covering contracts and torts.[30] Article 3(1) starts with a general clause: "A non-contractual obligation arising out of a harmful event shall be governed by the law of the country with which it is most closely connected."[31] The first, more precise, rule in Article 3(2) is designed for *Babcock* cases: "When the author of the damage or injury and the person who suffers damage or injury are habitually resident in the same country at the time of the harmful event, it shall be presumed that the obligation is most closely connected with that country."[32]

It can be taken for granted that the final version of a European Convention for the law applicable to contractual obligations will not be different in this respect.

III. SOLUTIONS

It is interesting to see how European law developed pragmatically without any revolution. There was no controversy insofar as there must be a basic rule which has to be consulted absent specific factors. This basic rule has always been the *lex loci delicti commissi.* There has also been the unanimous conviction that such a basic rule is rather fortuitous in many cases and therefore should be replaced by rules with less fortuitous connecting factors. Such a factor is the common habitual residence of tortfeasor and victim at the time the tort was committed. There is, however, one point of disagreement: How should this relation between general and special rules be drafted? There are three different possibilities:

- Principle and exception (EU-draft, Benelux-Project, Hague Convention 1971; Portuguese and Polish codifications);
- Law of the closest connection and presumptions for those connections (draft of the Groupe européen);
- Different rules for different sets of facts (Swiss P.I.L. Act).

Problems (Arts. 21-23), *and The Final Provisions* (Arts. 24-36), *in* European Private International Law of Obligations 53 (1975), (referring expressly to *Babcock v. Jackson*).

29. *Cf.* cases cited in *supra* note 13.

30. *See* Marc Fallon, *Proposition pour une convention européenne sur la loi applicable aux obligations non contractuelles*, 7 European Review of Private Law 45, 46 (1999) (English version).

31. *Id.* at 47.

32. *Id.*

All these methods have certain advantages, but cannot be qualified as being incorrect. My summary is that accidents in Europe exclusively between American tourists will be decided according to the law of their common habitual residence in a State of the United States. This is also true if they brought a lawsuit in Europe and not, as in all cases discussed, in their home state. Also, under the forthcoming European law, Italy should apply German law to German school classes on excursions in Italy.[33]

33. *Cf.* European Court of Justice Apr. 21, 1993, case 172/92 (Sonntag v. Waidmann), 83 *Revue critique de droit international privé* 96 (1994).